

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal from Laurens County
Hon. Eugene C. Griffith, Jr. Circuit Court Judge

Opinion No. 2016-UP-424 (S.C. Ct. App. filed October 12, 2016)

Appellate Case No: 2016-002523

THE STATE,RESPONDENT,

v.

DANIEL MARTINEZ HERRERA, PETITIONER.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON CERTIORARI

I.

Whether the Court of Appeals properly found the trial court did not abuse its broad discretion in allowing Detective Jared Hunnicutt to testify regarding the identification of the marijuana at issue in this case, when Hunnicutt's testimony was being offered as non-scientific expert testimony.

II.

Are the Second and Third issues raised by Petitioner on certiorari to this Court properly preserved for appeal where Petitioner did not raise them to the Court of Appeals, nor did he raise them to the trial court. Furthermore, even if the issues were properly preserved, whether the State is required to negate every exception to the crime Petitioner was charged with pursuant to S.C. Code Ann. § 44-53-540, where Petitioner was free to question the manner in which the State weighed the marijuana at issue and to prove an exception to S.C. Code Ann. § 44-53-370(e)(1).

STATEMENT OF THE CASE

On October 8, 2010, the Laurens County Grand Jury indicted Petitioner for trafficking in marijuana, greater than ten pounds but less than one hundred pounds. On December 16-18 2013, a jury trial was held in the Laurens County Court of General Sessions with the Honorable Eugene C. Griffith Jr., presiding. Petitioner was represented by Chelsea McNeil, Esquire of the Laurens County Public Defender's Office. Respondent (the State) was represented by Deputy Solicitor Dale Scott and Assistant Solicitor Taylor Daniel of the Eighth Circuit Solicitor's Office. Petitioner was not present at trial and was tried in his absence. At the conclusion of trial, the jury convicted Petitioner as indicted. Judge Griffith imposed a sentence that was sealed until Appellant was apprehended. On June 6, 2014, Appellant appeared before the Honorable Frank R. Addy, Jr. for sentencing. Judge Addy unsealed Judge Griffith's sentence and Appellant was committed to the South Carolina Department of Corrections for five years.

Petitioner then filed a timely notice of appeal. On Appeal to the Court of Appeals, Petitioner argued: (1) the trial court erred in denying his motion for a directed verdict when the State failed to present any evidence that the weight of the marijuana at issue was ten pounds or more and (2) the trial court erred in allowing expert testimony regarding the weight of six vacuum-sealed bags of marijuana when the State failed to establish that the methodology used to weigh the marijuana was scientifically reliable. Following the submission of briefs, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion without oral argument. State v. Daniel Martinez Herrera, Op. No. 2016-UP-424 (Ct. App. filed October 12, 2016).

Thereafter, Petitioner filed a petition for rehearing with the Court of Appeals on October 27, 2016. In this petition for rehearing, Petitioner abandoned his claim that the trial court erred

by not granting a directed verdict. The Court of Appeals issued an order denying the petition for rehearing on November 17, 2016.

On January 19, 2017, Petitioner filed a petition for a Writ of Certiorari and accompanying appendix with this Court. In this petition, Petitioner continued to only challenge the expert testimony presented at his trial and does not challenge the Court of Appeals' determination that the trial court properly denied Petitioner's motion for a directed verdict. On February 21, 2017, the State filed a Return. On February 1, 2018, this Court granted Petitioner's petition for a Writ of Certiorari. This brief of Respondent now follows.

STATEMENT OF FACTS

On August 12, 2010, Glenda Armstrong returned to her home in Laurens, South Carolina—where she had lived for twenty-two years—and found a package on her side porch. (R. 23-27). Armstrong picked up the package and inspected it, noting that it came from Texas and was addressed to “Yems Smith” with an address that matched her own. (R. 25-26, 40). Labels on the outside of the package indicated that it contained blinds. (R. 26-27, 40). Armstrong, who had not ordered anything, asked her neighbor if the package was for her and her neighbor replied it was not. (R. 25). Armstrong, curious as to why the package listed her address, took the package inside and opened it. (R. 25-26). Upon peeking inside, Armstrong noticed several air-compressed packages of what she believed to be marijuana and contacted the City of Laurens Police Department. (R. 25-27).

Officer Brandy Anderson from the Laurens Police Department responded to a dispatch call around 6:00 p.m. about a package containing possible drugs. (R. 37-38). Upon arriving at Armstrong’s home, Anderson met with Armstrong and viewed the package. (R. 38-39). Relying on her prior law enforcement experience, Anderson determined the package contained marijuana based on the substance’s appearance and odor. (R. 39-41). Anderson seized the package and all of its contents. (R. 29, 42).

After leaving Armstrong’s home, Anderson called Detective Leanne Riggott and asked Riggott to meet her at the police station to take custody of the package. (R. 42-44). Once at the police station, Riggott took control of the package and weighed its contents. (R. 44-45, 59). Riggott then secured the package in her locked office overnight in accordance with department procedure. (R. 59).

Meanwhile, two Hispanic adults—one man and one woman—came to Armstrong’s house inquiring about the package. (R. 29, 46). Armstrong told them she had returned the package to the post office and it could be picked up there. (R. 29-30). According to Armstrong, the man “tried to convince [her] . . . that [Armstrong] had the pot and [she] wasn’t going to give it up.” (R. 29, lines 21-22). Armstrong insisted she had returned the package to the post office. (R. 29). The man then stated the package contained clothing for his children to go to school. (R. 30). Armstrong again insisted she had taken the package to the post office and that it could be retrieved from there. (R. 30). After the two left, Armstrong called law enforcement and provided a description of the man and woman. (R. 29, 46-47). Law enforcement used this information to generate an incident report. (R. 47).

The following morning, Detective Walter Bentley of the Laurens Police Department took possession of the package and attempted to arrange a controlled pickup from the post office. (R. 72-74). Bentley planned to take the package to the post office, speak with postal employees, and explain that when the suspect arrived to pick up the package he or she would be placed under arrest. (R. 74, 77). Bentley and Detective Tony Lynch went to the Laurens Post Office to attempt the controlled pickup, arriving at approximately 8:30 a.m. in an unmarked SUV. (R. 76-78). The post office did not open until 9:00 a.m., but another car was already waiting in the parking lot when Bentley and Lynch arrived. (R. 76-77). The car contained a Hispanic male matching the description of the suspect who came to Armstrong’s house the previous day. (R. 76-77). Bentley decided his previous plan of a controlled pickup would not work because the suspect was already in the parking lot, so he elected to wait and follow the suspect into the post office instead. (R. 77-78). When the post office opened, the suspect (later identified as Petitioner) entered. (R. 78). Bentley, dressed in plain clothes, took off his firearm, placed his badge in his pocket, and

followed Petitioner into the post office. (R. 78). Petitioner approached the counter and explained that he lived at the address next to Armstrong's, but his package had accidentally been sent to Armstrong's residence and she sent the package back to the post office. (R. 78). The postal employee looked for the package to no avail and told Petitioner it was not there. (R. 78-79). When Petitioner asked the employee to look again for the package, Bentley interjected and stated he had Petitioner's package. (R. 78-79). Petitioner replied, "Oh shit, Senior." (R. 79). Bentley placed Petitioner under arrest and searched him incident to arrest. (R. 79). Petitioner had two slips of paper in his pocket with the name "Yems Smith" and Armstrong's address written on both. (R. 79-80, 188).

Bentley subsequently investigated both the name "Yems Smith" and the name and address on the package's shipment label from Texas without success. (R. 80, 84-85). He also passed the information and names along to different federal law enforcement agencies but did not receive any responsive information. (R. 84-85).

Detective Jared Hunnicutt, the marijuana analyst for Laurens Police Department, later examined and analyzed the package's contents. Hunnicutt, a ten-year veteran of the police force, graduated from Lander University with a degree in criminal justice management. (R. 100). He attended and successfully completed a South Carolina Law Enforcement Division (SLED) course to become a marijuana analyst, requiring a 100% accuracy rate when testing one-hundred different samples. (R. 96-98). Based on his experience and training, Hunnicutt concluded that the green, leafy substance within the package was marijuana. (R. 117-19). Hunnicutt also weighed the marijuana, which totaled 10 pounds, 2.78 ounces. (R. 121-22).

Petitioner was charged with trafficking in marijuana, more than ten pounds but less than one hundred pounds and was released from pretrial detention on bond. (R. 1-7). Petitioner failed

to appear for his trial and was tried in his absence after the trial court denied his counsel's motion for a continuance. (R. 1-7). The State presented Armstrong, Anderson, Riggott, Bentley, Hunnicutt, and Captain John Stankus as witnesses. The State originally sought to admit Hunnicutt as an expert in the field of marijuana analysis, but the court ruled he was not so qualified. (R. 108-11). However, the court did allow Hunnicutt to testify as an expert in marijuana identification. (R. 110-11, 114-15).

At the close of the State's case, Petitioner moved for a directed verdict arguing that the State did not present sufficient evidence that Petitioner "knowingly" attempted to possess the requisite amount of marijuana to be convicted of trafficking¹. (R. 130-33). The State responded that it had satisfied its burden of establishing that the weight of marijuana qualified as trafficking and that there was no requirement Petitioner knew the exact weight of the marijuana. (R. 133-34). The court denied Petitioner's motion and submitted the case to the jury. (R. p. 136).

Petitioner requested jury instructions on the lesser included offenses of possession with intent to distribute marijuana and possession of marijuana. (R. 137, 142). Petitioner argued there was some discrepancy regarding the total weight of the marijuana and therefore Petitioner was entitled to jury instructions on lesser included offenses. (R. 137-44). Over the State's objection, the trial court agreed to charge the jury on the lesser included offense of possession with intent to distribute marijuana. (R. 137-44).

During deliberations, the jury sent a note inquiring about Hunnicutt's testimony and whether stems counted towards the requisite ten pound requirement for trafficking in marijuana as charged. (R. 173). The court provided the jury with the statutory definition of marijuana in

¹ Petitioner argued for a directed verdict only on the basis that Petitioner did not knowingly attempt to possess the requisite amount of marijuana. Petitioner did not raise any issues related to Hunnicutt not knowing the statutory definition of marijuana or how he weighed the drugs. At trial, Petitioner only raised these concerns when asking the trial judge to instruct the jury on the lesser included offense of possession with intent to distribute marijuana. (R. 142).

response. (R. 174, 177, 186-87). After deliberating for seventy-five minutes in total, the jury convicted Petitioner of trafficking in marijuana, more than ten pounds but less than one hundred pounds. (R. 173-75).

ARGUMENT

I.

The Court of Appeals properly found the trial court did not abuse its broad discretion in allowing Detective Jared Hunnicutt to testify regarding the identification of the marijuana at issue in this case, when Hunnicutt's testimony was being offered as non-scientific expert testimony.

On appeal to this Court, Petitioner abandons his initial claim of error made to the Court of Appeals. Petitioner initially alleged the trial judge erred by failing to grant a directed verdict in favor of Petitioner; however, Petitioner now attempts to refashion his second claim of error to the Court of Appeals into three separate claims of error to this Court. Petitioner's first claim of error is properly preserved for consideration by this Court on certiorari because a similar argument was presented for consideration to the Court of Appeals. However, as will be discussed below, Petitioner's remaining claims of error are not preserved for review by this Court because they were not presented to the Court of Appeals in Petitioner's final brief or in his motion for rehearing.

Petitioner contends the Court of Appeals erred in affirming the trial court's ruling that Detective Hunnicutt's testimony on the identification and weight of marijuana was properly admitted as non-scientific expert opinion testimony. In support of that contention, Petitioner argues Hunnicutt's testimony went beyond the scope of his expertise and his methodology was not reliable under the standards articulated in State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001). Petitioner's argument is without merit. The trial court did not abuse its broad discretion by qualifying Hunnicutt as an expert witness in the field of marijuana identification because Hunnicutt possessed prior law enforcement experience working with marijuana and he had completed a course on marijuana identification at the South Carolina Law Enforcement Division (SLED). The evidence and testimony presented during trial established that Hunnicutt's

testimony could assist the jury in understanding and resolving the issues raised in Petitioner's case, namely whether Petitioner possessed marijuana. The testimony presented at trial also established that Hunnicutt possessed the requisite knowledge, skill, training, and experience to qualify as an expert in marijuana identification, and that Hunnicutt's testimony was reliable in light of his training and how he applied that training in identifying the marijuana in this case.

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial courts have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial court's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). Likewise, a decision as to whether to admit or exclude expert testimony rests within the trial court's sound discretion and will not be reversed on appeal absent a prejudicial abuse of that discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE; "Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in

which the subject matter falls outside the realm of ordinary lay knowledge.” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

In order to admit scientific evidence under rule 702 SCRE, the trial court must find: (1) the testimony will assist the trier of fact, (2) the witness is qualified, (3) the underlying science is reliable, and (4) the testimony’s probative value is not outweighed by its prejudicial effect. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). To determine if the underlying science is reliable, the trial judge should apply the factors set out in State v. Jones. Id. See State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); State v. Jones, 343 S.C. 562, 573, 541 S.E.2d 813, 819 (2001).

In order to admit non-scientific evidence under rule 702 SCRE, the trial court must still make a determination as to the proposed testimony’s reliability. State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). However, while the trial court still serves an important gatekeeping function in such cases, “the foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony.” White, 382 S.C. at 274, 676 S.E.2d at 688. Accordingly, there is no formulaic approach that a trial court can or must apply to determine reliability in cases involving nonscientific expert testimony. Id. The trial judge is merely required to “assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact.” White, 382 S.C. at 274, 676 S.E.2d at 689. In determining whether a witness’s knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. State v. Henry, 329 S.C. 266, 274, 495 S.E.2d 463, 467 (Ct. App. 1998). “The criteria for admitting the testimony of an expert is not whether the expert holds a degree in the specialty field he seeks

to testify about, but whether he has such expertise in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.” State v. Peer, 320 S.C. 546, 554-555, 466 S.E.2d 375, 380 (Ct. App. 1996).

In the present case, the evidence and testimony presented during trial established (1) Hunnicutt’s expert testimony regarding marijuana identification could assist the jury in understanding and resolving the issues raised in Petitioner’s case; (2) Hunnicutt had the requisite knowledge, skill, training, and experience to qualify as an expert; and (3) the subject matter of Hunnicutt’s testimony was reliable. Therefore, the trial court did not abuse its discretion by qualifying Hunnicutt as an expert in the field of marijuana identification.

Hunnicutt’s testimony was necessary in Petitioner’s case because the State had to prove that the substance at issue was marijuana and identifying marijuana is beyond the ordinary knowledge of the average juror². Therefore, the trial court correctly determined it was necessary for Hunnicutt to testify as an expert in order to identify the package’s contents as marijuana.

In addition to the ability of Hunnicutt’s testimony to assist the jury, Hunnicutt was also qualified to offer an expert opinion as to the package’s contents based on his own knowledge, skill, training, and experience. Hunnicutt’s testimony was non-scientific and based upon his prior law enforcement experience of handling marijuana cases frequently for more than a decade. (R. 112-15). During his law enforcement career, Hunnicutt testified that he made numerous marijuana arrests, he had seen marijuana “thousands” of times, and he was very familiar with identifying marijuana. (R. 100-01, 111). Hunnicutt further testified he was familiar with several unique characteristics of marijuana, including its particular odor and appearance. (R. 98, 112-

² Petitioner asserted at trial and asserts on appeal that Hunnicutt needed to be an expert to testify about the weight of the marijuana at issue in addition to being able to identify it. Knowing how to weigh a controlled substance is not beyond the ordinary knowledge of the average juror. However, assuming for the sake of argument that expert opinion is required to testify about the weight of a controlled substance, the trial judge correctly held that an expert in the identification of marijuana can also testify about its weight. (R. 120).

14). Hunnicutt also attended and successfully completed a SLED course on marijuana analysis that required a one-hundred percent accuracy rate when testing one-hundred different samples. (R. 96-98). During his SLED training, Hunnicutt learned how to analyze marijuana microscopically based on “physical, observable distinctive characteristic[s] of marijuana,” as well as chemically by using the Duquenois-Levin test. (R. 98-99). Hunnicutt’s practical experience in marijuana identification coupled with his training from SLED demonstrated his expertise on the subject matter and enabled him to assist the jury with a matter beyond the knowledge of an ordinary layperson. See Honea v. Prior, 295 S.C. 526, 530, 369 S.E.2d 846, 849 (Ct. App. 1988) (“A witness may be competent to testify as an expert although the witness acquired his or her knowledge *through practical experience and not by scientific study, training, or research.*”) (emphasis added)); As a result, the trial court properly found Hunnicutt to be qualified as an expert in marijuana identification.

Finally, Hunnicutt’s testimony as to the identification of the package’s contents as marijuana met the threshold of reliability necessary for it to be admissible during Petitioner’s trial. Hunnicutt testified that he was trained during his coursework at SLED to identify marijuana both microscopically and chemically. (R. 98-99). Furthermore, in order to pass his SLED course, Hunnicutt had to identify one hundred out of one hundred samples correctly. (R. 114). Hunnicutt testified that he analyzed each sample in this case using a microscope to locate the “unicellular” and “multicellular” identifiers for marijuana that he learned about in his SLED training. (R. 117, lines 4-5). Considering that Hunnicutt used the same method in this case that he used to correctly identify one-hundred out of one-hundred samples at SLED combined with his decade of law enforcement experience, there was enough evidentiary support presented at trial for the trial judge to determine that a sufficient threshold level of reliability had been established.

Because Hunnicutt's testimony satisfied all of the requirements for the admission of expert testimony in South Carolina, his expert testimony on marijuana identification was properly introduced during trial. Petitioner was able to challenge that testimony through cross-examination and by calling the jurors' attention to any defects or deficiencies he believed existed in regard to the knowledge, skill, training, or experience of Hunnicutt. Accordingly, the trial court did not abuse its broad discretion by qualifying Hunnicutt as an expert and permitting Hunnicutt to present his expert testimony to the jury, and its ruling was not arbitrary, unreasonable, or unfair. Petitioner's conviction should be affirmed.

II.

The second and third issues raised by Petitioner on certiorari to this Court are not properly preserved for appeal because Petitioner did not raise them to the Court of Appeals. However, even if the issues were properly preserved, the State is not required to negate every exception to the crime Petitioner was charged with pursuant to S.C. Code Ann. § 44-53-540, but rather Petitioner was free to question the manner in which the State weighed the marijuana at issue and to prove an exception to S.C. Code Ann. § 44-53-370(e)(1).

Petitioner alleged that the trial court committed two reversible errors when he filed his final brief with the Court of Appeals. Petitioner alleged: 1) the trial court erred in denying his motion for a directed verdict when the State failed to present any substantial circumstantial evidence that the weight of the marijuana at issue was ten pounds or more as required by S.C. Code Ann. § 44-53-370(e)(1); and (2) the trial court erred by allowing expert testimony regarding the weight of six vacuum-sealed bags of marijuana when the State failed to establish that the methodology used to weigh the marijuana was scientifically reliable under State v. Jones. (Final Brief of Appellant p. 4). However, after the Court of Appeals affirmed Petitioner's conviction in State v. Daniel Martinez Herrera, Op. No. 2016-UP-424 (Ct. App. filed October 12, 2016), Petitioner abandoned his first claim of error and asked the Court of Appeals to

reconsider their ruling in regards to his second claim of error only. (Petition for Rehearing p. 1-2). Likewise, when Petitioner petitioned this Court for a Writ of Certiorari, he abandoned his first claim of error to the Court of Appeals and instead fashioned his second claim of error into three separate alleged errors that were not properly presented to the Court of Appeals.

In Petitioner's petition for certiorari and in his brief to this Court, he asks this Court to reverse the holding of the Court of Appeals on three separate grounds. Petitioner's first assignment of error is analogous to his original claim to the Court of Appeals, namely that the Court of Appeals erred by affirming the trial court's ruling that allowed Hunnicutt to give expert opinion testimony on the weight of the six vacuum sealed bags of marijuana at issue in this case. This claim of error is properly before this Court and has been addressed in the preceding section of this brief.

However, Petitioner's remaining two claims of error, (1) that the Court of Appeals erred by allowing Hunnicutt to testify about the weight of the marijuana because he did not know the statutory definition of marijuana and thus did not remove excludable parts of the marijuana plant before he weighed the packages, and (2) that the Court of Appeals erred by allowing Hunnicutt to testify about the weight of marijuana because he utilized a non-representative sampling method to account for the weight of the packages, were not raised to the Court of Appeals in his final brief, his petition for rehearing, or his arguments to the trial court. Therefore, Petitioner's remaining claims of error are not preserved for appeal, and are not properly before this Court.

Issue Preservation

"There are two prerequisites to preserving an issue for consideration by the Supreme Court on a writ of certiorari: (1) the issue must have been raised in the initial arguments to the Court of Appeals, and (2) the issue must have been raise in the petition for rehearing before the

Court of Appeals.” JEAN HOEFER TOAL, APPELLATE PRACTICE IN SOUTH CAROLINA, 210 (3d ed 2016); Rule 242(d)(2), SCACR; See Mazloom v. Mazloom, 392 S.C. 403, 709 S.E.2d 661 (2011). “An issue not raised to or addressed by the Court of Appeals is not properly preserved for review by the Supreme Court on certiorari.” Id. “In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.” State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). A party may not argue one ground at trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001). “Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review.” State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011).

Here, Petitioner did not present his second and third claims of error to the Court of Appeals in his final brief, or in his petition for rehearing, nor did he raise these claims at trial. Therefore, they are not preserved for consideration by this Court.

Petitioner’s second claim of error alleges the Court of Appeals erred in affirming the trial court’s decision to allow Hunnicutt to testify regarding the weight of the marijuana at issue because Hunnicutt did not know the statutory definition of marijuana, and therefore he failed to remove excludable plant material when weighing the marijuana. The Court of Appeals did not address this issue in their opinion because the issue was not presented to the Court in the context of the trial judge’s ruling on expert testimony. The only argument Petitioner made to the Court of Appeals regarding Hunnicutt’s lack of knowledge of the statutory definition of marijuana was made in relation to whether the trial court should have granted a directed verdict in Petitioner’s favor. (Final Brief of Appellant p. 12-17). Petitioner argued that because Hunnicutt did not

remove excludable portions of the marijuana sample, “the evidence relied upon by the State does not amount to substantial circumstantial evidence reasonably tending to prove Appellant’s guilt or from which his guilt may be fairly and logically deduced.” (Final Brief of Appellant p. 17). Petitioner was concerned with Hunnicutt’s lack of statutory knowledge not because of how it affected his qualifications as an expert, but because Petitioner felt Hunnicutt’s method of weighing the marijuana called into question whether the State’s evidence could withstand a directed verdict. Petitioner did not present the admissibility of Hunnicutt’s testimony about his knowledge of the statutory definition of marijuana or what parts of the marijuana plant he weighed as an issue to the Court of Appeals. Because this issue was not presented to the Court of Appeals, it is not properly preserved for review by this Court on certiorari.

Petitioner’s third claim of error alleges the Court of Appeals erred by allowing Hunnicutt to testify about the weight of marijuana because he utilized a non-representative sampling method to account for the weight of the packages. Assuming for the sake of argument that Hunnicutt would need to be tendered as an expert to testify about the weight of a controlled substance, Petitioner did not preserve this issue for appeal because he did not argue it to the Court of Appeals. Unlike Petitioner’s second issue that was argued in a wholly different context of whether the trial court should have directed a verdict in Petitioner’s favor, Petitioner’s third issue is argued in context but only mentioned in passing in his brief to the Court of Appeals. Petitioner mentions Hunnicutt’s weighing methods only as a factor for the Court of Appeals to consider in determining whether the trial court abused its discretion in tendering Hunnicutt as an expert in the field of marijuana identification. (Final Brief of Appellant p. 21-22). However, Petitioner did not present whether Hunnicutt utilized a non-representative sampling method in

weighing marijuana as a question to the Court of Appeals. Because this issue was not presented to the Court of Appeals, it is not properly preserved for review by this Court on certiorari.

Petitioner's limited concerns with Hunnicutt's testimony are reflected not only in how he framed his issues to the Court of Appeals, but also in how he framed his concerns at trial. When the State attempted to tender Hunnicutt as an expert in the field of marijuana analysis³ at trial, Petitioner made the following objection:

Assistant Public Defender McNeil: Thank you, Your Honor. Setting Watson versus Ford Motor Company, in order to qualify an expert it is a three step process. Number one, subject matter is such that the jury would need assistance on. Number two, training and qualifications. Your Honor, in this case we would submit that a sixteen hour course is simply not enough. And number three, it is going to be the defense position that the State has not satisfied the four factors of the State versus Jones and State versus Council. So we would ask that you not qualify this man as an expert.

(R. 107-08, lines 18-3). Petitioner objected to Hunnicutt's general qualifications as an expert in the field of marijuana analysis based on deficiencies in his training and qualifications. Petitioner did not object to Hunnicutt's testimony because he does not know the statutory definition of marijuana, or based on his method of weighing the drugs. In fact, the only time Petitioner raised a concern about Hunnicutt not knowing the statutory definition or with how the drugs were weighed is when Petitioner asked the trial judge for an instruction to the jury on the lesser included offense of possession with intent to distribute marijuana. (R. 142). Petitioner requested a lesser included instruction because, "the defense has raised an issue of weight, the weight of the marijuana is in dispute. Also, Hunnicutt weighing everything that is in the bag was including stems and seeds" (R. 142, lines 11-14). The trial judge granted Petitioner's request to instruct the

³ The trial judge ultimately sustained Petitioner's objection to Hunnicutt testifying as an expert in marijuana analysis. (R. 111). However, the trial judge allowed the State to attempt to tender Hunnicutt as an expert in the field of marijuana identification, and ultimately allowed him to testify as an expert in that field. (R. 111, 115).

jury on the lesser included offense and even provided the jury with a written copy of the statutory definition of marijuana when the jury asked a question. (R. 166, 173, 186). Therefore, Petitioner did not raise this current issue with sufficient specificity to the trial judge. To the extent Petitioner did raise it, he received the relief he requested from the trial judge, and therefore cannot now complain about this issue on appeal. Petitioner's second and third issues are not preserved for review by this Court on certiorari. Petitioner's conviction and sentence should be affirmed.

The State is not required to prove exceptions under S.C. Code Ann. § 44-53-540

Assuming for the sake of argument that Petitioner's second and third issues are properly preserved, Petitioner's issues are without merit, because the State is not required to prove the negative that criminal defendants don't fall under exceptions to our state's drug statutes. The burden of proof lies with the person claiming its benefit. Both Petitioner and the State are in agreement that there is no South Carolina case law interpreting the statutory definition of marijuana. In the absence of such authority, Petitioner asks this Court to impose an unreasonable and legally unrequired task on the State at trial to "test either all, or a representative sampling, of the seeds found in a substance containing marijuana to reliably determine the percentage of those seeds capable of germination." (Brief of Petitioner, p. 11). Petitioner's request is not consistent with the decisions of our state's Appellate Courts, our state's drug statutes, or the interpretation of similar statutes in other states.

In South Carolina, it is illegal to traffic in marijuana. S.C. Code Ann. § 44-53-370(e)(1) (Supp. 2006). In relevant part, South Carolina's definition of trafficking marijuana includes: "Any person . . . who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession" of ten pounds or more of marijuana.

S.C. Code Ann. § 44–53–370(e)(1). “The weight of any controlled substance referenced in this article is the weight of that substance in pure form *or any compound or mixture thereof.*” S.C. Code Ann. § 44–53–392. (emphasis added). Pursuant to S.C. Code Ann. § 44-53-110 (27)(a), marijuana is defined as:

- (i) *all species or variety of the marijuana plant and all parts thereof whether growing or not;*
- (ii) *the seeds of the marijuana plant;*
- (iii) the resin extracted from any part of the marijuana plant; or
- (iv) every compound, manufacture, salt, derivative, mixture, or preparation of the marijuana plant, marijuana seeds, or marijuana resin.

(emphasis added). However, specifically excluded from the definition of marijuana are “mature stalks” and “the sterilized seed of the marijuana plant which is incapable of germination.” S.C. Code Ann. § 44-53-110 (27)(b). Pursuant to S.C. Code Ann. § 44-53-540:

It shall not be necessary for the State to negate any exemption or exception set forth in this article in any complaint, information, indictment or other pleading or in any trial, hearing, or other proceeding under this article, and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit.

This statute is consistent with our state’s case law on statutory exceptions and provisos. It is “well established in case law that when the State has made out a prima facie case under a statute and the defendant claims to fall within an ‘exception’ or ‘proviso’ in the statute the burden is on the defendant to establish such a defense.” State v. Attardo, 263 S.C. 546, 552, 211 S.E.2d 868, 871 (1975).

At trial, the State was only required to present proof that Petitioner possessed or attempted to possess or bring into this state ten pounds or more of marijuana in a pure form or in any compound or mixture thereof. The State was not required to negate every exemption or exception to what qualified as marijuana under S.C. Code Ann. § 44-53-370(e)(1). S.C. Code Ann. § 44-53-540 clearly shows that it was not the Legislature’s intention to force the State to

negate every possible exception to the statute. The burden is instead placed squarely on a defendant to prove an exception. Therefore, neither the Court of Appeals nor the trial court erred by not requiring such a showing from the State.

Petitioner, however, was free to defend the State's accusations in any way that he saw fit. One avenue available to him was to prove the marijuana he was arrested for attempting to possess did not weigh ten pounds because of excludable material. To prove this, Petitioner could have hired an expert to weigh the marijuana after extracting all excludable material from the sample. However, Petitioner did not pursue this strategy. Instead, Petitioner chose the perfectly reasonable alternative strategy of challenging the weight of the marijuana by impeaching Hunnicutt through questioning his expertise and the methods and techniques he used to weigh the marijuana. Unfortunately for Petitioner, the jury still found beyond a reasonable doubt that Petitioner possessed or attempted to possess ten pounds or more of marijuana.

Because this issue has not been addressed by our state's Appellate Courts, Petitioner urges this Court to adopt the holdings of other states that have ruled on similar issues. Specifically, Petitioner cites the Ohio Court of Appeals ruling in State v. Yanowitz. In Yanowitz, the Ohio Court of Appeals considered whether a statutory definition of marijuana that is very similar to our state's definition, required the State to separate the excludable portions of the marijuana plant when weighing a given marijuana sample. State v. Yanowitz, 67 Ohio App.2d 141, 426 N.E.2d 190 (Ohio Ct. App. 1980). The Ohio Court found that it was the intent of their legislature to require the State to prove that the marijuana at issue did not contain any excludable material. Yanowitz 67 Ohio App.2d at 150-151, 426 N.E.2d at 197. However, the reasoning presented in Yanowitz should be unavailing to this Court, because the statutes that were interpreted by the Ohio court are clearly distinguishable from the relevant statutes in our state.

While the definition of marijuana crafted by the Ohio legislature is similar to our state's definition, the state of Ohio does not have a statute that is analogous to S.C. Code Ann. § 44-53-540. This is significant because S.C. Code Ann. § 44-53-540 conclusively establishes it was the intent of the South Carolina Legislature to place the burden of proof on the person claiming an exception to the drug laws in this state. The South Carolina Legislature did not intend to place the burden on the State to remove excludable material before weighing a drug sample.

A more appropriate example for this Court to consider comes from the State of Nebraska where the Nebraska Supreme Court considered a very similar question regarding the statutory definition of marijuana. In considering whether the State had the burden to prove whether the defendant's conduct under Nebraska's drug law was not a statutorily excepted act, the Nebraska Supreme Court cited to a Nebraska law that is identical to S.C. Code Ann. § 44-53-540. State v. Taylor, 221 Neb. 114, 120, 375 N.W.2d 610, 615 (1985). Like S.C. Code Ann. § 44-53-540, Neb.Rev.Stat. § 28-432(1) states that "it shall not be necessary for the state to negate any exemption or exception set forth in this article...and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit." Neb.Rev.Stat. § 28-432(1). After considering the language of Neb.Rev.Stat. § 28-432(1), the Nebraska court found the trial record was "devoid of any evidence to suggest that [Taylor's] acts *were* within an exception. Taylor 221 Neb. at 221, 375 NW.2d at 615. Therefore the trial court correctly refused to charge the jury that the State had the burden to prove Taylor did not fall within an exception to the Nebraska drug law. Id.

The reasoning of the Nebraska court is instructive in our current case. Like the defendant in Taylor, Petitioner did not produce any evidence that he fell within an exception to S.C. Code Ann. § 44-53-370(e)(1). Petitioner was certainly free to attempt to prove he fell within an

exception. Petitioner could have proven he fell within an exception by testing the marijuana himself and showing that the amount he was attempting to possess weighed less than ten pounds once excludable material was removed. Petitioner chose not to attempt to do this. A plain reading of S.C. Code Ann. § 44-53-540 shows the South Carolina Legislature intended for the burden to prove such an exception be on the Petitioner and not the State. Because the burden to prove an exception does not lie with the State, Petitioner's second and third claims of error are without merit. Petitioner's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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April 11, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
APR 11 2018
S.C. SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS
Appeal from Laurens County
Hon. Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2016-002523

THE STATE,.....RESPONDENT,

v.

DANIEL MARTINEZ HERRERA,.....PETITIONER.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Brief of Respondent on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Lanelle Cantey Durant, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.
This 11th day of April, 2018.


Sally Ellison

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